

The logo for Squire Patton Boggs, featuring the company name in a serif font and a circular icon with a stylized 'S' and 'P' to the right.

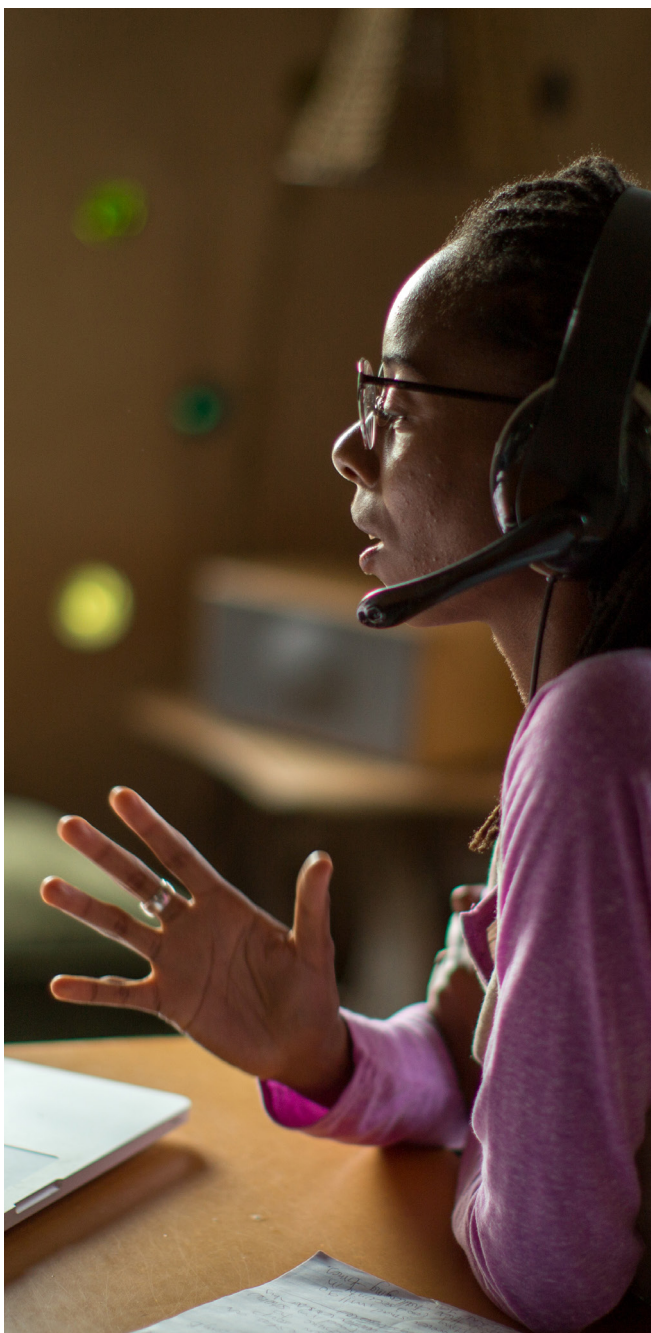
SQUIRE
PATTON BOGGS

Local Connections. Global Influence.

frESH Law Horizons

December 2021





UK

Court imposing a fine may take into account a business's financial health in the future and the potential impact of the COVID-19 pandemic. In *R v Modus Workspace Ltd* [2021] EWCA Crim 1728, the Court of Appeal ruled that a judge was correct to consider the projection of a downturn in a construction company's business due to the COVID-19 pandemic when imposing a fine. However, the appeal was dismissed in this circumstance since the company was projected to remain profit-making. The sentencing judge in the initial court found that the company did not make a loss over the course of its business and, despite the pandemic, its turnover was not projected to shrink by a substantial degree. The company had been convicted of breaches of the Health and Safety at Work etc. Act 1974. The guideline starting point taken by the judge was a fine of £1.1 million, payable in instalments of £300,000 each, with a final portion of £200,000. The appeal was dismissed. This case serves as a timely reminder that businesses should be prepared to fully demonstrate to the court a projected downturn in profits if they seek a reduction in a fine imposed following conviction, particularly where that projected downturn comes as a result of the pandemic, but, ultimately, the [sentencing guideline for health and safety](#) does not specifically require judges to have regard to future performance, although the law does provide for adjustments to be made in the future by the magistrates' court as to the rate of the payment of the fine and, in particular circumstances, remission of part of the fine.

The Health and Safety Executive (HSE) publishes guidance on managing home workers' health and safety. [The guidance](#) from the HSE has been published in connection with the UK government advice that from 13 December 2021, people should work from home if they can (as part of its COVID-19 response [plan B measures](#)). It states that "Most of the time, risks to home workers will be low and the actions that should be taken to protect them will be straightforward." It advises that risk assessments should be carried out for home workers and should include consideration of stress and poor mental health, working with display screen equipment (DSE) and their working environment. Risk reduction measures for DSE should cover both in-home and in-office use, and should reduce risks to ensure that "home workers can achieve a comfortable, sustainable posture while working with DSE" and "any equipment provided is safe and suitable for use." The guidance is relevant to all businesses that employ home workers or users of DSE in-office, and should be considered best practice. A full [list of guidance and support](#) from the government, on COVID-19 restrictions, is available online.

The HSE publishes its response on proposed amendments to the PPE regulations. In November 2020, [the High Court ruled](#) that the government had failed to adequately transpose EU laws on personal protective equipment (PPE) into UK law. The HSE has published its [response to a consultation](#) on proposed amendments to the Personal Protective Equipment at Work Regulations 1992 (PPER 1992), which places duties on employers and employees in regard to PPE, which will see those duties extended to limb (b) workers. According to the [HSE's guidance on types of workers](#), "a 'limb (b) worker' can be understood as a 'dependent contractor'. A 'worker' is registered as self-employed but provides a service as part of someone else's business. They generally must carry out the work personally, rather than being able to send someone in their place." In its response, the HSE proposes that secondary legislation to amend the PPER 1992 be introduced into Parliament in early 2022 to ensure limb (b) workers are provided with the same PPE protections as employees. It added that "The amendments to the PPER 1992 will potentially affect any industry sector in which employers engage limb (b) workers. This includes the transport, construction, health and social care, agriculture and manufacturing sectors, amongst others." We will report further if/when the draft legislation becomes available.



Manufacturer is fined after a worker suffers an injury from a lathe. A manufacturer of brick products was [fined £530,000](#) after a worker's hand became entangled in a lathe. The HSE found that the company failed to put in place adequate arrangements and controls for using the lathe, and that the risk assessment used was unsuitable and insufficient in that it did not properly assess or address the risk of entanglement associated with the use of emery cloth or gloves. They also considered that there was inadequate training, instructions and supervision as to these risks. The company pleaded guilty to breaching Section 2(1) of the Health and Safety Act 1974. The case serves as a reminder that businesses using potentially dangerous machinery should ensure that all relevant risks are considered and that such considerations carry through not only to risk assessments, but also to training, supervision and instructions.

Bribery conviction is quashed for disclosure failures of the Serious Fraud Office (SFO). In *R v Akle and Bond* [2021] EWCA Crim 1879, [the Court of Appeal quashed the conviction on appeal](#) and declined to order a re-trial when it found that the SFO failed in its duty of disclosure. The conviction related to two counts of conspiracy to give corrupt payments. The SFO failed to disclose several communications between a third-party private investigator and both the director and chief investigator of the SFO. The court found that, if full disclosure had been given, the trial judge may not have rejected the defendant's application to exclude evidence of an alleged co-conspirator's guilty pleas. This meant that the defendant could not present his case in the best light and his conviction was, therefore, unsafe. The court described the SFO refusal to provide documents as a "serious failure" to comply with its duty. The case serves as a reminder of the disclosure obligations on prosecuting authorities, and the potentially serious consequences of failures to meet these obligations.

Home Office consultation on the revised Covert Human Intelligence Sources (CHIS) code of practice. [The consultation](#) seeks comments on the newly redrafted CHIS code of practice, which now includes provisions relating to the authorisation of criminal conduct by CHIS introduced by the [Covert Human Intelligence Sources \(Criminal Conduct\) Act 2021](#) (CHIS Act) and some minor updates and clarifications. The CHIS code of practice is intended to guide law enforcement agencies, the UK Intelligence Community and public authorities as to best practice when exercising their powers under the CHIS Act. Those powers can be exercised by regulators including the HSE, the Food Standards Agency and the Environment Agency (EA), as well as County Councils and local authorities. The consultation closes on 6 February 2022 and we will report further when the responses are published.

Oil company is fined following a liquid petroleum gas (LPG) leak. The operator of the UK's largest oil refinery was [fined £500,000](#) after a leak of LPG at the site, which went unnoticed for approximately four hours and took a further hour to resolve. The HSE found that the leak occurred because LPG was pumped through the pipework at a higher pressure than the valve allowed, there was no detection process in place for discrepancies in the flow in the pipe, and there was a failure to take all measures necessary to prevent a major incident. The company pleaded guilty to breaching Regulation 5(1) of The Control of Major Accident Hazards Regulations (COMAH) 2015. The HSE inspector in the case commented afterwards on the requirement for "layers of protection" where there are large quantities of substances that can cause major incidents. The HSE has a number of guidance documents available on its website, specifically relating to [LPG](#).

New Crown Court sentencing tool is announced by the Sentencing Council. The Sentencing Council has launched its new tool to support Crown Court sentencing: [Sentencing ACE](#). The "ACE" in Sentencing ACE stands for "avoidance of common errors". The use of the tool is voluntary, unlike the sentencing guidelines that judges must comply with, but allows judges to quickly check the relevant sentence, instead of referring to the full guideline. It may also help defendants (or their advisers) to prepare for sentencing in terms of relevant matters to address the court on. Time will tell on how well utilised the tool will be and whether it will reduce the number of appeals resulting from technical errors on sentencing.



Grenfell Inquiry: Trade press reports that current and previous governments are accused of “deliberately covering up” fire safety risks to buildings. According to the [reports](#), a barrister representing survivors and bereaved families in the Grenfell Inquiry submitted that both the current and previous governments were responsible for “collusion” with the construction industry to suppress the findings of investigations into previous cladding fires, most notably the findings of the inquest into the Lakeland House fire in 2009. The coroner in that inquest recommended that guidance on building regulations should be rewritten and cautioned the government that all parts of a building should be examined in fire safety inspections. Michael Gove MP, The Secretary of State for Levelling Up, Housing and Communities, told MPs that his department “will be seen to have, on a couple of occasions, not necessarily appreciated the importance of fire safety and not necessarily done everything in the wake of the Lakeland House tragedy that it should have done.” The barrister submitted that David Cameron should appear before the inquiry over remarks made in 2010, “ridiculing” health and safety. Mr. Cameron is alleged to have said he wanted to “scrap health and safety rules that put people off” and that “Britannia didn’t rule the waves with arm bands on.” A number of former government ministers and senior officials are expected to provide evidence in the inquiry in 2022 and we will report further on that evidence.

Health and safety data: Latest workplace fatality, ill-health and enforcement statistics are released, showing a decrease in prosecutions and reporting that workplace stress, anxiety and depression causes half of work-related illness. [Data from the HSE](#) shows that a total of 142 workers were killed at work in Great Britain in 2020-21, an increase of 29 from the previous year, though the number of deaths in 2019-20 (113) was low compared to other recent years. [Construction was found to be the most dangerous industry](#) in Great Britain, with 39 deaths recorded. The HSE also published statistics related to [ill-health](#) and [enforcement](#). Notably, stress, depression or anxiety accounted for half of all work-related ill-health in 2020-21. Prosecutions decreased by 42% from the previous year, with only 199 cases prosecuted. However, of those 199 cases, 185 secured a conviction. Another global [research](#) report also found that fishing has the highest average rate of workplace fatalities globally (15.96 per 100,000 workers). Associated threats to health and safety include working in unpredictable weather conditions, on the open water, and from great heights. The second and third most dangerous industries globally were reported to be mining (14.09 per 100,000 workers) and agriculture (11.26 per 100,000 workers).

Construction company and groundworks contractor is sentenced. A principal contractor was [fined £400,000 and a director of its instructing construction company was sentenced to 14 months’ imprisonment suspended for 24 months](#), following alleged unsafe excavation work. In carrying out the work, a worker used a mechanical electric breaker and struck a power cable with a voltage of 415v. The ground worker received an electric shock, causing burns to his hand and arm. The HSE found that site plans had not been consulted and a cable avoidance tool had not been used in advance of the work, labourers were not properly trained or supervised, and the principal contractor failed to plan, manage and monitor the excavation works, as well as failed to provide adequate supervision. The contractor pleaded guilty to breaching section 13 (1) of the Construction (Design and Management) Regulations 2015 and the director of the construction company pleaded guilty to breaching Section 37(1) Health and Safety Work etc. Act 1974. The case shows that serious failings can lead to convictions for not only the company actively involved in the breach, but also the instructing company.



Report on workplace health and safety for pregnant women during the pandemic is published by Maternity Action.

The report published in December, and titled [Unsafe and Unsupported: workplace health and safety for pregnant women in the pandemic](#), found that “misleading and changing advice” and “gaps in official guidance” has “resulted in many pregnant women wrongly being told to work in unsafe working conditions and women suffering substantial financial loss when taking steps to avoid these risks.” It also states that “HSE guidance on individual risk assessments is incorrect, ignoring recent case law.” The report makes 16 recommendations to improve the safety of, and protect the employment of, pregnant employees, and concludes that these issues remain relevant as the pandemic continues. Employers of pregnant women should consider using the report as a basis for risk assessing their pregnant employees’ work environment and tasks, to ensure that they adequately protect their health and safety, as it identifies gaps and inconsistencies in current guidance that might otherwise have formed the basis of those risk assessments. It comments that unsafe working conditions during the pandemic include all public-facing roles and childcare roles, and that failures by employers to identify risks that the pregnant women themselves were able to identify was commonplace (48% of women surveyed). In addition, it indicates that pregnant women were often not provided access to suitable alternative work, were not advised of their right to paid maternity suspension or were refused furlough, and highlights that “the Coronavirus Job Retention Scheme (CJRS or furlough scheme) guidance made no mention of pregnant women.” However, it should be noted that it is not clear whether courts would consider the examples given in the report as breaches of health and safety law. The [HSE guidance](#) on protecting new and expectant mothers focuses on harm through certain working conditions (such as carrying heavy loads) and the use of physical, chemical or biological agents.

Safety Assessment Federation (SAFed) issues guidance on the use of drone technology, relevant to use of drones for access to critical parts and/or safety devices.

The [guidance](#) seeks to inform the competent person on the use of drone technology and data to support thorough examination/inspection of various types of plant and equipment using case studies. The guidance states that the use of drones for these means is becoming commonplace where “a safe means of access to critical parts and/or safety devices is not available, by suitable and satisfactory means, and/or the detail obtained will enhance the findings of the thorough examination/inspection, and the total operational impact is justified.” The guidance points out examples where it will be safer to use a drone to carry out inspections, such as where the equipment to be inspected is too high for the use of a ladder, is over water, or access is obstructed by other machinery. It also provides details of safety requirements for using drones, such as PPE in the form of helmets, safety glasses, ear defenders and safety shoes – mostly to reduce the risk of a potential falling object hazard presented by the drone.

A costs order may be quashed where it is based on a fundamental mistake in calculating the value of an offender’s assets.

In *R v Ogg* [2021] EWCA Crim 1903, the Court of Appeal ruled that a substantial costs order against a convicted offender may be quashed where a confiscation order is significantly reduced due to a fundamental and mutual mistake of fact as to the value of the offender’s assets. The convicted offender in the case was made subject to a confiscation order of more than £600,000 and a costs order of almost £60,000 on the basis that his assets were valued at £2.9 million. However, it subsequently came to light that the assets were worthless. The confiscation order was varied by the Crown Court to the sum of £5,188, which represented the entirety of the convicted offender’s realisable assets. The court upheld the appeal as to the costs order stating that “a court which imposes a confiscation order in an amount equal to the whole of the defendant’s assets should not in addition make an order for the payment of the costs of the prosecution” and that the costs order was, therefore, not properly made. This case serves as a reminder to defendants in criminal proceedings to ensure that they present an accurate figure of their realisable assets, in order to avoid confiscation and/or costs orders being made against them that they cannot pay.



Call for evidence on assessment of per- and polyfluoroalkyl substances (PFAS) regulatory options in Great Britain. The HSE and the EA have been asked by government to conduct a Regulatory Management Options Analysis (RMOA) to identify the most appropriate regulatory options for managing any risks to human health and the environment from PFAS. To obtain information to support the analysis, HSE has invited interested parties to respond with information relevant to the manufacture, import, marketing and use of PFAS in Great Britain. The final RMOA report will be made available on HSE's website, with publication expected in the summer of 2022.

Forest risk commodities due diligence consultation. Following the establishment of the enabling framework in the Environment Act 2021, the government has issued a consultation on the implementation of new due diligence requirements on forest risk commodities. The consultation seeks views on many aspects of the new regime, including which commodities will be considered "forest risk commodities"; which businesses will be subject to the new requirements; what they will have to do and what they will have to report in relation to their due diligence; what information will be made public; and how the obligations will be enforced. Seven commodities are proposed for initial inclusion (cattle (beef and leather), cocoa, coffee, maize, palm oil, rubber and soy), but with a phased approach, so that the regime would not apply to all seven at first. Additional commodities may also be added subsequently. Business size thresholds will be based on turnover, and the threshold may vary between commodities. The consultation seeks views on a range of turnover threshold options, between £50 and £200 million, as well as addressing other issues such as the treatment of non-UK entities, and exemption tonnage thresholds (under which the requirements will not apply). The consultation also seeks views on the due diligence system to be established, including the use of existing certification schemes and standards. In relation to enforcement, the proposals are for a range of civil sanctions to be available, with a maximum variable monetary penalty of £250,000, in line with other regimes, such as the Ivory Act. The consultation does not indicate a timeline for the new regime to take effect, but states that the government intends to lay initial secondary legislation at the earliest opportunity. However, businesses would have a period of time to prepare before the beginning of the first reporting period. The consultation is open for responses until 11 March 2022. For more details, please see this post on the [Global Supply Chain Law Blog](#).

UK REACH registration deadlines are deferred and a new model is being considered. The Secretary of State for Environment, Food and Rural Affairs [wrote](#) to the UK Chemical Industries Association in December, explaining that the government intends to explore alternative arrangements for UK REACH transitional registrations, in order to support chemical businesses while safeguarding public health and the environment, and will consult with stakeholders on extending existing deadlines to provide the full registration data, in order to minimise disruption and support the process of a new model being developed. The letter specifically mentions that the government is minded to extend the 27 October 2023 deadline to 27 October 2025. The model being discussed would reduce the need for replicating EU REACH data packages and putting a greater emphasis on improving our understanding of the uses and exposures of chemicals in the context of Great Britain. According to media reports, such as [ENDS](#), this move has been criticised by the UK NGO community, and EU chemical stakeholders have also raised concerns.



Publication of the UK REACH approach to including substances of very high concern (SVHC) on the candidate list.

This policy statement from the Department for Environment, Food and Rural Affairs (DEFRA) includes information on interim principles for adding substances to the UK REACH candidate list; assessment of substances in the EU REACH candidate list pipeline and inclusion of substances on the UK REACH candidate list. HSE has said that it will shortly publish an initial assessment of substances in the EU REACH candidate list pipeline to accompany this. When UK REACH came into force, all substances that were on the EU REACH candidate list were carried over onto the UK REACH candidate list. The UK REACH work programme for 2021 to 2022 committed to assess substances that have been added to the EU candidate list since 1 January 2021, to consider if it was appropriate to add them to the UK REACH candidate list.

Plastic packaging tax (PPT) – updates to guidance and amending legislation are issued. Various updates to HM Revenue and Customs' (HMRC) guidance have been issued throughout December, including confirmation of a [delay to the requirement to show PPT on invoices](#); further examples of [packaging that is in and out of scope](#); more [information on exemptions](#); examples of [tests and calculations](#) applying the 10 tonnes registration threshold, direct exports, claiming tax credits and calculating whether multi-material packaging components are plastic; [how VAT interacts with PPT](#); information on the [records and accounts](#) that businesses will be required to keep to support their PPT returns; what [information is needed to register](#) for PPT; and how to make [due diligence checks](#). The [Plastic Packaging Tax \(Descriptions of Products\) Regulations 2021](#) have been made and come into force on 1 April 2022, following earlier consultation, removing three categories of products from the meaning of a plastic packaging component and adding a further category of products.

Severn Trent Water (STW) is fined £1.5 million for sewage discharges. The water company was also ordered to pay prosecution costs of £58,365. The fine related to discharges from four sewage treatment works in Worcestershire between February and August 2018, in respect of which the company failed to respond to alarms warning of a blockage, failed to adequately manage sewage sludge, and failed to adequately manage a situation when a piece of equipment failed. STW pleaded guilty, although its previous convictions were an aggravating feature for the purposes of sentencing. Since these incidents, the company has advised the EA that it has changed its management structure, provided better technical support and invested in the relevant treatment works.

The Committee of Advertising Practice (CAP) and The Broadcast Committee of Advertising Practice (BCAP) publish guidance on environmental claims. CAP offers guidance on the interpretation of the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code) in relation to non-broadcast marketing communications, and BCAP offers guidance on the interpretation of the UK Code of Broadcast Advertising (the BCAP Code) in relation to broadcast advertisements. This guidance addresses how to understand and apply the CAP and BCAP Code rules on misleading environmental claims and social responsibility.



Legislation is issued on new RoHS restrictions and exemptions. The [Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment \(Amendment\) Regulations 2021](#) restrict the use of four phthalates (bis(2-ethylhexyl) phthalate (DEHP), butyl benzyl phthalate (BBP), dibutyl phthalate (DBP) and diisobutyl phthalate (DIBP)) in Great Britain in manufacturing medical devices and monitoring and control equipment from July 2022 – a restriction that already applies in the EU and Northern Ireland. They also amend the RoHS exemptions to permit lead and hexavalent chromium in the manufacture of electric initiators in civil explosives used in mining and quarrying, and mercury in the manufacture of rotating connectors used in ultrasound imaging systems (again mirroring existing EU/Northern Ireland provisions).

HM Treasury has published a call for evidence on the design of the landfill tax. Landfill tax was introduced on 1 October 1996 to encourage the diversion of waste away from landfill and towards more environmentally friendly waste management options. Environmental objectives have evolved since the introduction of the tax, whereas the structure of landfill tax has remained broadly the same. The government, therefore, announced a review of landfill tax in spring 2021, which will consider the structure of landfill tax and the impacts of any proposed changes (including on waste crime). As part of this review, HM Treasury is seeking input on how landfill tax can support the government's aim to achieve zero avoidable waste by 2050, and other objectives in the [25 Year Environment Plan](#) and the [Resources and Waste Strategy](#). The call for evidence is open until 22 February 2022.

EA issues 10 new standard rules permits for biowaste. Standard rules environmental permits are a simplified version of environmental permitting, for more basic processes that do not require bespoke permit conditions. Each specified activity covered by a standard rules type of permit has a set of rules and a risk assessment. The EA has added 10 new standard rules permits for biowaste activities, such as composting and anaerobic digestion (SR2021 numbers 1 to 10). It has also withdrawn SR2015 No 12 (75kte non-hazardous mechanical biological (aerobic) treatment facility).

Department for Business, Energy and Industrial Strategy (BEIS) has published a consultation on the future of climate change agreements (CCAs). The consultation confirms that BEIS supports a new, reformed version of CCAs after the current scheme ends on 31 December 2022 (although it gives reduced climate change levy rates until 31 March 2025). BEIS is seeking views on the key aspects of a future scheme, where reforms may be required and what some of those reforms may entail. BEIS is particularly seeking input on future scheme length, eligibility, increasing uptake of energy efficiency technologies and increasing transparency of action taken. The consultation is open until 11 March 2022.



EU

European Commission proposes new rules to boost renovation and decarbonisation of buildings. The Commission presented its [proposal](#) for a revised Energy Performance of Buildings Directive (EPBD). Commission Executive Vice-President for the European Green Deal, Frans Timmermans, [commented](#) that the renovation of homes and other buildings supports economic recovery and creates new job opportunities. By targeting the obstacles to renovation and providing financial support for the necessary upfront investment, the proposal aims to boost the rate of energy renovation across the EU. Its focus on the worst-performing buildings prioritises the most cost-effective renovations and helps fight energy poverty. Lower energy bills would lead to investments paying for themselves. The proposal foresees that as of 2030, all new buildings must be zero-emission, with all new public buildings having to be zero-emission as of 2027. The proposal requires that the worst-performing 15% of the building stock (corresponding to energy performance grade G) of each member state is upgraded to at least grade F. The deadline for this is 2027 for non-residential buildings and 2030 for residential buildings. Stakeholders may provide [feedback](#) on the proposal until 14 February 2022.

European Commission presents a new regime on recycled plastic food contact material (FCM) and articles. The Commission [presented](#) a draft Commission regulation on recycled plastic materials and articles intended to come into contact with foods, repealing Regulation 282/2008. It also organised two webinars ([general points, for recyclers](#)) to explain the draft new provisions. They take a partially different approach from the existing regime and introduce new definitions and requirements for the placing on the market of recycled plastic FCMs, the development and operation of recycling processes to produce that plastic, and the use of recycled plastic FCMs. The [feedback period](#) for the draft runs until 18 January 2022. Then a committee composed of member state representatives/experts will vote on it, which will be followed by three months of scrutiny by the Council and the European Parliament. After that, the Commission will adopt its proposal and it will enter into force.

European Commission formally starts an initiative on microplastics releases. The Commission [launched](#) a call for evidence for an upcoming law aiming to tackle microplastics that are unintentionally released into the environment. This initiative, already foreseen in the [new Circular Economy Action Plan](#) (CEAP 2.0), will focus on labelling, standardisation, certification and regulatory measures, addressing the main sources of these microplastics. The initiative addresses the largest microplastics contributors in the EU (nearly two-thirds of total emissions): tyre abrasion, pre-production plastic pellets and synthetic textiles during their entire life cycle. Ecodesign requirements, including new materials, will be considered for tyre abrasion and synthetic textiles, as well as the development of a standard on tyre abrasion. The call for evidence is [open for feedback](#) until 18 January 2022. The Commission plans a public consultation in Q1 2022, and to propose a regulation in Q4 2022.

First technical taxonomy criteria enter into force. Under Taxonomy Regulation 2020/852, an economic activity qualifies as environmentally sustainable (in the context only of establishing the degree to which an investment in the economic activity is environmentally sustainable) only if it complies with technical screening criteria (TSC) established by the Commission (among other things). [Commission Delegated Regulation 2021/2139](#) sets out the TSC for determining whether an economic activity contributes substantially to climate change mitigation or climate change adaptation, and whether, at the same time, it does no significant harm (DNSH) to any of the other environmental objectives under the Taxonomy Regulation. These TSC came into force on 1 January 2022.



European Commission proposes new rules against environmental crime. The Commission [adopted](#) a proposal for a directive on the protection of the environment through criminal law, replacing Environmental Crime Directive 2008/99 (ECD). It also published a [communication](#) on “stepping up the fight against environmental crime”. The ECD has provided that a set of environmental offences are considered as crimes in all EU member states. However, the ECD has not prescribed the levels and types of criminal sanctions. The Commission [explained](#) that the evaluation of the ECD showed that only a low number of environmental crime cases are successfully investigated, prosecuted and punished, as well as non-effective cooperation between member states (see also [frESH Law Horizons November 2020](#)). Therefore, the new proposal focuses on updating the list of criminal offences, strengthening the provisions on criminal sanctions (types and levels), and strengthening enforcement across member states. In addition, the Commission proposed new categories of criminal offences regarding timber trade; ship recycling; water abstraction from ground or surface water; serious breaches of EU chemical legislation, rules on fluorinated greenhouse gases and legislation on invasive alien species; serious circumvention of requirements relating to environmental impact assessments; and source discharge of polluting substances from ships. The provisions on penalties specify the term of imprisonment of individual persons for certain offences, and propose additional sanctions, such as withdrawal of permits, disqualifications, fines and exclusion from access to public funding. Offences under the scope of the ECD must be punishable by fine, and the maximum fine must not be less than 3% to 5% (depending on the offence) of the total worldwide turnover of the legal person in the business year preceding the fining decision. The Commission has submitted its legislative proposal to the European Parliament and the Council. It will follow the ordinary legislative procedure.

European Commission starts evaluation of the rules on environmental liability. The Commission [launched](#) a call for evidence for an evaluation of the Environmental Liability Directive 2004/35 (ELD). The ELD establishes a framework to prevent and remedy environmental damage, based on the “polluter pays” principle. The ELD requires the Commission to carry out an evaluation by Q2 2023. In early 2021, the Commission adopted guidelines to clarify the scope of the term “environmental damage” and how member states can better assess damage to water and land, as well as protect species and natural habitats (see [frESH Law Horizons March 2021](#)). A public consultation on the evaluation of the ELD is expected in Q2 2022.

Chemical industry warns that upcoming EU chemical legislation puts the industry at crucial crossroads. Cefic, the European Chemical Industry Council, [released](#) a [phase-one report](#) (including [Q&A](#)) on the impacts of selected actions from the European Commission’s [Chemicals Strategy for Sustainability](#) (CSS) on the European chemical industry. The report covers the addition of new hazard classes and identification criteria to the Classification, Labelling and Packaging Regulation 1272/2009 (CLP) for endocrine disruptors (EDs), PBT, vPvB, PMT, vPvM, immunotoxicants and neurotoxicants, and the extension of the Generic Risk Approach (GRA). The study concludes that the considered changes to the GRA and CLP are generally expected to restrict the manufacturing and use of products and increase the costs of their production. Phase one of the project will also include the introduction of a Mixture Assessment Factor, while phase two will address the PFAS ban, the export ban and extending REACH registration requirements to chemicals produced in low tonnage bands. The next report is expected to be published in Q2 2022.



European Commission's consultant lays out an action plan on essential uses of chemicals. According to the [Chemicals Strategy for Sustainability](#) (CSS), the European Commission will "define criteria for essential uses to ensure that the most harmful chemicals are only allowed if their use is necessary for health, safety or is critical for the functioning of society and if there are no alternatives that are acceptable from the standpoint of environment and health. These criteria will guide the application of essential uses in all relevant EU legislation for both generic and specific risk assessments." The CSS action plan indicates that the Commission will define the criteria in 2021-22. In November 2021, Wood, the consultant that supports the Commission regarding this task, [said in a presentation](#) that it will carry out eight case studies in key sectors, to test the concept and refine policy options. The not-exhaustive and not yet final list of case studies includes:

- Perfluorooctane sulfonic acid (PFOS) and perfluorooctanoic acid (PFOA) in Persistent Organic Pollutants (POPs) Regulation 2019/1021
- Nickel in Toy Safety Directive 2009/48 (as an example for carcinogenic, mutagenic or reprotoxic (CMR) substances)
- Formaldehyde in the Cosmetics Regulation 1223/2009 (as an example for CMRs)
- Triclosan in the Biocidal Products Regulation 528/2012
- Bis(2-ethylhexyl) phthalate (DEHP) in REACH, Cosmetics Regulation 1223/2009, the Toy Safety Directive and the legislation on food contact materials (FCMs), in particular Regulation 1935/2004

The plan outlined by Wood foresees a one-day stakeholder workshop, an open public consultation and a targeted consultation, with a view to produce a final report at the end of June 2022.

European Commission opens consultation on simplification and digitalisation of chemicals labelling. At the end of November, the Commission opened a [consultation](#) on simplification and digitalisation of labelling requirements regarding chemical substances contained in many products used daily, such as glues, and laundry and dishwashing detergents, as well as fertilisers. The Commission's objective is to improve the communication of essential information on chemicals. Two recent evaluations, the fitness check of the most relevant chemicals legislation (excluding REACH) and the evaluation of the Detergents Regulation 648/2004, had shown that label comprehension and, consequently, consumer protection could be further improved by avoiding overloading labels with information. The Commission formally started this initiative in July 2021 ([please see Sustainability Outlook July 2021](#)). It is linked to the broader [revision of the CLP Regulation](#) ([please see frESH Law Horizons May 2021](#)). The consultation will run until February 2022.

European Chemicals Agency (ECHA) identifies the need for regulatory risk management measures or further data regarding chemicals. ECHA [announced](#) the results of the first assessments carried out on more than 450 substances in 19 groups of chemicals. For 18 of these groups, ECHA concluded that regulatory risk management measures or further data are necessary. The first results include four groups of phthalates and phthalates-like substances that ECHA and member states assessed as a group due to their potential reprotoxic, endocrine disrupting, or persistent, bioaccumulative and toxic (PBT) properties. For some of these phthalates, a restriction has been proposed to limit their potential releases from articles. In addition, the assessment highlights a need for harmonised classification and labelling, as well as identification as substances of very high concern (SVHCs) for some. For other substances in these groups, ECHA concluded that there is currently not enough information to confirm the potential hazard. A few did not require any new regulatory actions for the time being.



ECHA announces that its scientific committees support further restrictions of PFAS. ECHA's Committees for Risk Assessment (RAC) and Socio-Economic Analysis (SEAC) support Germany's proposal to restrict the use of undecafluorohexanoic acid (PFHxA) and related substances. The potential restriction is expected to reduce further environmental and human exposure to these chemicals resulting mainly from uses in FCMs, textiles and fire-fighting foams. ECHA [will publish](#) the final text of the opinions. In the meantime, its [press release](#) highlights that RAC supported the proposed restriction, in particular for uses where it is not possible to minimise emissions through other means. This was especially relevant for consumer uses in FCMs and textiles, as well as for fire-fighting foams used by municipal fire departments and at home. SEAC considered that a restriction of PFHxA is, in general, an appropriate measure to address the identified risks. However, while SEAC concluded that a restriction of certain uses was likely to be proportionate (e.g. textiles in consumer apparel, paper and cardboard in FCMs and cosmetic products), uncertainties in the available information prevented SEAC from concluding that the proposed restriction, as a whole, was appropriate.

ECHA launches a call for evidence on a possible restriction dossier for ortho-phthalates. ECHA [launched](#) a call for evidence on restriction for ortho-phthalates, a group of chemicals commonly used as additives to produce plastics. The call for evidence concerns 10 phthalates (three for which applications for authorisations were submitted before their latest application date and seven for which the sunset date has passed). The sunset date is the date from which the placing on the market and use of a substance is prohibited unless an authorisation is granted. ECHA must consider whether the use of such substances in articles after the sunset date pose a risk to human health or the environment that is not adequately controlled. If that is the case, ECHA must prepare a REACH restriction dossier. Following an assessment of the available evidence, ECHA is currently of the view that there is no need to prepare such a restriction dossier. Nevertheless, it is seeking information to support the potential future investigation of risks from ortho-phthalates. Risks from the use of these 10 phthalates in articles will be considered as part of a larger investigation to address risks from ortho-phthalates. The deadline to [provide input](#) is 26 January 2022.

ECHA reports on widespread non-compliance of articles sold online. The [report](#) is the result of an enforcement project carried out during 2020 in 29 countries of the EEA and Switzerland (REF-8). Inspectors evaluated the compliance of online product offers with various requirements of the CLP and REACH Regulations. These included information for the customer about the type of hazard, and the obligation to provide the most up-to-date version of the safety data sheet (SDS). In many member states, inspections targeted products and offers with high assumed risks (risk-based approach), which might have contributed to a higher-than-expected rate of non-compliance. The non-compliance for restrictions regarding substances/mixtures was 95%, and 25% for restrictions regarding articles. The lower rate for articles could be explained by the difficulty inspectors may have faced in determining non-compliance for articles by assessing information provided on the website, as chemical analyses often have to be done to detect non-compliance. The report makes some recommendations to the European Commission, which include making online marketplaces "responsible and liable for enforcement of illegal products/offers, especially from sellers outside the EU", strengthening and harmonising the regulation of online commerce across the EU, and financing "targeting tools" for national enforcement authorities to "better scan online offers".



Contacts



Rob Elvin
Partner, Manchester
T +44 161 830 5257
E rob.elvin@squirepb.com



Nicola A. Smith
Director, Birmingham
T +44 121 222 3230
E nicola.smith@squirepb.com



David Gordon
Partner, Birmingham
T +44 121 222 3204
E dave.gordon@squirepb.com



Anita Lloyd
Director, Birmingham
T +44 121 222 3504
E anita.lloyd@squirepb.com



Ken Huestebeck
Senior Associate, Brussels
T +322 627 11 02
E ken.huestebeck@squirepb.com



Gary Lewis
Director, Manchester
T +44 161 830 5373
E gary.lewis@squirepb.com



SQUIRE 
PATTON BOGGS
squirepattonboggs.com